IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX REFERENCE NO. 697 OF 1987

M/s.Universal Ferro & Allied
Chemicals Ltd. ...Applicant
V/s.
The Commissioner of Income-tax,
Bombay City-VI, Bombay. ...Respondent

Mr.Nishant Thakker i/b. M/s.Mulla & Mulla for Applicant.
Mr.Parag Vyas for Respondent.

CORAM : V.C. DAGA AND
A.S. AGUIAR, JJ.

DATED : AUGUST 12, 2005.

P.C. :-

. By this reference under Section 256(1) of the Income Tax, 1961, the Income Tax Appellate Tribunal has referred the following questions of law arising out of the order passed for the Assessment Year 1979-80 for the opinion of this Court :-

"(1) Whether in respect of Precision Investment Casting Unit (Unit-Deritend Precision Castings) which had made a loss, assessee was right in claiming that 80J deduction in respect of said Unit should not be carried forward u/s.80J(3)

and should be set off against profits or other units for assessment year 1979-80 ?

(2) Whether assessee was entitled to depreciation/investment allowance on expenditure of Rs.5.75 lakhs ?"

2. So far as the first question is concerned, the learned Counsel for the assessee did not press it.

3. The assessee is engaged in the business of mining. The assessee company wanted to find out and locate new mining areas where low phosperous/low ferro manganese ore was available. Consequently, expert was engaged to examine and submit report which can be said to be a report relating to technical know-how. The expenditure claimed of Rs.5,75,000/-, which was a fee paid by way of professional charges in the accounting year 1979-80. On receiving the report of the said consultants, the assessee decided not to make heavy investment in acquiring the said mining areas. The said expenditure appeared in the balance sheet for the year

ending on 31st March, 1976 under the head "Technical Khow-how" under Fixed Assets schedule. The said expenditure was written off in the account year under consideration ending on 31st March, 1979.

4. The ITO rejected the assessee’s claim but CIT (Appeals) directed that depreciation/investment allowance should be allowed though according to CIT (Appeals), deduction of the said expenditure as revenue expenditure has been rightly disallowed. Revenue appealed against the CIT (Appeal)’s directions to allow depreciation and investment allowance. Assessee while filing appeal against CIT order did not take any ground claiming the said expenditure as revenue expenditure. However, assessee filed an additional ground on 28th January, 1985 to raise the additional ground which Tribunal refused to accept. The Tribunal accepted revenue’s plea that no depreciation/investment allowance was allowable on the said expenditure as it was infructuous expenditure as no capital assets had been acquired or used in the assessee’s business.

5. Learned Counsel for the assessee submitted that even if the report of the technical consultant is accepted, it did not see the light of the day by reason of the adverse advise given by the consultant, but nonetheless the report of the consultant can be treated as a plant and depreciation allowed. He placed reliance on the decision of the **Madras High Court** in the case of **Commissioner of Income-Tax v. Tamil Nadu Chemical Products Ltd., (2003) 259 ITR 582** wherein it was held that the subsequent event of the return of the information to the Japanese supplier would not affect the fact that during the year the assessee had acquired the industrial information with a view to using the same in its business. So also the fact that the project itself had to be abandoned subsequently by reason of the Government not making available the liquid petroleum gas required for the manufacture of the product for which this know-how had been acquired would not take away the fact that the expenditure had been incurred for the purpose of acquiring the know-how in the relevant previous year and the order of the Tribunal was upheld holding that the assessee was entitled to deduction

under Section 35AB for the assessment year 1991-92.

6. Learned Counsel for the applicant assessee submits that the consideration relevant for allowing deduction under Section 35AB holds good even while considering the question of allowing deduction under Section 32-1 of the Act. He further placed reliance on the Judgment of **Delhi High Court** in the case of **Commissioner of Income-Tax v Harsha Tractor Ltd. (2001) 249 ITR 499** wherein project report was held to be a "plant" and the deprecation allowance on the project report was allowed under Section 43(3) of the Act. He also placed reliance on the Judgment of the **Supreme Court** in the case of **Scientific Engineering House P.Ltd. v. Commissioner of Income-Tax, Andhra Pradesh (1986) 157 ITR 86 (SC)** in support of this submission. Lastly, he also relied upon the Judgment of the **Gujarat High Court** in the case of **Commissioner of Income-Tax, Gujarat-II v. Elecon Engineering Co.Ltd. (1974) 96 ITR 672** wherein the Gujarat High Court ruled that know-how is a peculiar kind of asset and having regard to the legislative intent to give a wide meaning to the word

"plant", material record of know-how is clearly included within the meaning of the word "plant" in section 32.

7. After the aforesaid submission and the reliance placed on various judgment by the learned Counsel appearing for the Assessee in support of his submission, he also placed reliance on the finding recorded by the Tribunal while disposing of departmental appeal holding that expenditure incurred by the assessee was in the nature of capital field as it was regarding acquisition of new mines and therefore of the nature of capital expenditure. This finding has been accepted by the revenue. If one goes with the adverse finding recorded by the Tribunal that the expenditure is not that of revenue nature and are favourable finding recorded in favour of the revenue that the expenditure was in the nature of capital field and therefore, was of the nature of capital expenditure, then in that event one would come to the legal conclusion that the said finding would operate res-judicata between the parties. If that be so, the conclusive finding recorded by the Tribunal is that expenditure incurred was in the nature of capital

field and was of the nature of capital expenditure. Considering the aforesaid various judgments cited above, if the know-how is the plant, then in that event the applicant- assessee was entitled to claim depreciation allowance under Section 32 and either of the considerations. In that view of the matter, second question referred for our opinion is answered in favour of the assessee and against the revenue.

(A.S. AGUIAR, J.) **(V.C. DAGA, J.)**